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United States / 362

Circuit Court of Appeals

For the Ninth Circuit. /

PAUL LUND,

Appellant,

vs.

TOWN OF PETERSBURG, a Municipal Corpora-
tion,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Alaska, Division Number One.

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Names and Addresses of Attorneys of Record.

H. L. FAULKNER, Esquire, Juneau, Alaska,
Attorney for Plaintiff-Appellant.

HENRY RODEN, Esquire, Juneau, Alaska,
Attorney for Defendant-Appellee.

In the District Court for the Territory of Alaska
Division No. 1.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

Complaint.

Comes now the plaintiff above named and for
cause of action against the defendant alleges:

I.

That plaintiff is a citizen of the United States
and a resident of the Town of Petersburg, Alaska,
and the owner of real and personal property, lo-
cated within the corporate limits of said town, which
has been, is, and will continue to be assessed for the
purpose of taxation by said town, and that said town
has in the past, and hereafter will continue to levy
general taxes against the property owned by plain-
tiff, as aforesaid, for school and municipal purposes.

II.

That the defendant is a municipal corporation

located in Alaska and within that portion of Alaska over which the above-entitled Court has jurisdiction.

III.

That the population of defendant town is approximately 1000, and that the total assessed valuation of all the taxable real and personal property in said town, according to the last assessment thereof for the purposes of taxation, is the sum of \$598,780.00. [1*]

IV.

That the Common Council of said town heretofore has established therein a school district and provided the same with a suitable schoolhouse, and is now maintaining within said town and school district public schools, and has heretofore and will hereafter levy taxes upon all the taxable property within said town for the purpose of maintaining such public schools.

V.

That the Congress of the United States heretofore duly passed an act entitled, "An Act to authorize the incorporated Town of Petersburg, Alaska, to issue bonds in any sum, not exceeding \$75,000, for the purpose of constructing and installing a municipal electric light and power plant, and for the construction of a public school building," which act was duly approved on September 29, 1919, and thereupon became effective. (A copy of said act is hereto attached marked Exhibit "A" and by this reference made a part of this complaint). That

*Page-number appearing at foot of page of original certified Transcript of Record.

thereafter the Congress of the United States passed an act entitled, "An Act to amend an Act entitled 'An Act to authorize the incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building,' approved September 29, 1919," which last mentioned act was duly approved June 5, 1920, (copy of which is hereto attached marked Exhibit "B" and by this reference made a part of this complaint). That said last mentioned act amended Section 1 and Section 5 of the first mentioned act, and that said first act of Congress, as amended by said second act of Congress, is now in full force and effect.

VI.

That on the 19th day of March, 1923, the Common Council of defendant town did pass a certain ordinance, designated Ordinance No. 62 and entitled "An ordinance providing for a special election to be held in the Town of Petersburg, Alaska, a municipal corporation, to determine whether or not the said Town of Petersburg shall, (a) Issue its bonds [2] in the sum of approximately Thirty-five Thousand Dollars for the purpose of constructing and equipping a public school building; and (b) issue its bonds in the sum of approximately One Hundred Fifteen Thousand Dollars for the purpose of constructing and installing a municipal electric light and power plant, or for either of said purposes," which ordinance was immediately following its passage, and on the day of its passage, duly ap-

proved by the Mayor of said town; that a copy of said ordinance is hereto attached as Exhibit "C" and by this reference made a part hereof.

VII.

That under and pursuant to the provisions of said Ordinance No. 62, a special election was held in said town on Monday, April 30, 1923, at which election there was submitted to the qualified electors of said town for their approval or rejection the following questions or propositions:

A. Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding thirty five thousand dollars, for the purpose of constructing and equipping Public School Building within the corporate limits of said town;

B. Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding one hundred fifteen thousand dollars, for the purpose of constructing and installing a Municipal Electric Light and Power Plant.

that more than a majority of the qualified voters of said town, voting at said election upon each of said propositions, did vote in favor of each of said propositions.

VIII.

That by virtue of said acts of Congress, said Ord. No. 62 of said town, and by virtue of the votes cast at said election as aforesaid, said town now claims to be vested with full power, right and authority to become indebted, and to issue, sell and deliver its

general negotiable coupon bonds in the sum of \$35,000.00 for the purpose of constructing and equipping a [3] public school building therein and its general negotiable coupon bonds in the sum of \$115,000 for the purpose of constructing and installing a municipal electric light and power plant, as hereinafter set forth.

IX.

That by Sec. 7 of said Ord. No. 62, as amended by Ord. No. 63 of said town, passed and approved June 18, 1923, (a copy of which Ord. No. 63 is hereto attached as Exhibit "D" and by this reference made a part of this complaint), it is provided that said \$150,000 bonds shall bear interest at the rate of 7% per annum, payable semi-annually, shall be in denominations of \$500 or \$1000, or both, and shall mature as follows: \$5,000 on the first day of July in each year, commencing July 1, 1928, to July 1, 1942, both inclusive, and \$75,000 on the 1st day of July, 1943, and shall be payable, both principal and interest, at the office of the Guaranty Trust Company in New York City.

X.

That on the 18th day of June, 1923, the Common Council of said town did pass a certain ordinance known as Ordinance No. 64 entitled, "An ordinance providing for the issuance, sale, maturity and redemption of Municipal Electric Light and Power Bonds, in a sum not exceeding one hundred and fifteen thousand dollars, to be issued and sold for the purpose of constructing and installing a Municipal Electric Light and Power Plant," which ordinance

was on the day of its passage duly approved by the Mayor of said town; that a copy of said Ord. No. 64 is hereto attached as Exhibit "E" and by this reference made a part of this complaint. [4]

XI.

That by said Ord. No. 64 it is provided that said \$115,000 "Municipal Electric Light and Power Plant Bonds" shall be sold to Hubbell & Waller, a copartnership, at par and accrued interest, and shall be delivered from time to time as funds are required for the construction, erection, installation and equipment of said electric light and power plant; that said ordinance further provides that said \$115,000 bonds shall be in denominations of \$1,000 each, numbered consecutively from 1 to 115, both inclusive, shall be dated July 1, 1923, shall bear interest at the rate of 7% per annum, payable semi-annually, shall mature in the order of their numbers, lowest first, as follows: \$5,000 on July 1st of each of the years 1928 to 1942, inclusive, and \$40,000 on July 1, 1943, and shall be payable, both principal and interest at the office of the Guaranty Trust Company in New York City.

XII.

That by Sec. 7 of said Ord. No. 64 it is provided:

"That the said Town of Petersburg does hereby create and establish a sinking fund for the purpose of the payment of the principal of said bonds and the interest thereon as they mature and accrue; that the said Town of Petersburg shall annually levy and tax upon all the real and personal property situate within

the corporate limits of said town, subject to taxation, in amount sufficient to pay the interest and installments of principal due for the ensuing year, and such amounts as may be required for the payment of such interest and installments shall be kept and remain in said sinking fund and shall be used and applied to the payment of such interest and installments, and no part of such sinking fund shall be applied to any other purpose whatsoever.

XIII.

That said town, as part of said Municipal Electric Light and Power Plant, proposes to and will construct a power house on lands to be acquired by it at a distance of approximately fifteen miles outside the corporate limits of said town, and to transmit the electric energy generated at said power plant by transmission [5] lines to be constructed by it over rights of way to be acquired by it between said power-house and said town and wholly outside the corporate limits of said town; that said town proposes to and will sell a substantial portion of the power generated at and by said power plant to various private persons, firms and corporations for consumption and use outside the corporate limits of said town.

XIV.

That said town is not vested by law or otherwise with power or authority to acquire property located outside its corporate limits for the purpose of constructing a municipal electric light and power plant, and is not authorized by law or otherwise

to expend moneys derived from the sale of said \$115,000 Municipal Light & Power Plant Bonds for the purpose of acquiring any property outside its corporate limits for such use, or for constructing and equipping outside of its corporate limits any power plant, transmission lines, or any other structures, buildings, machinery and equipment to be used in connection therewith.

XV.

That said town is not authorized by law or otherwise to expend any of the moneys to be derived from the sale of said \$115,000 Municipal Electric Light & Power Plant Bonds for the purpose of constructing a municipal electric light and power plant or system to generate electric energy to be sold, consumed and used outside of the corporate limits of said town.

XVI.

That the corporate authorities of said town have no power or authority to assess, levy or collect for school and all other municipal purposes any annual tax in excess of two per centum of the assessed valuation upon all real and personal [6] property within said town.

XVII.

That if said bonds be issued by said town, as aforesaid, it will be necessary for said town, in order to maintain its corporate existence and perform its functions, and to maintain its public schools and to pay the principal and interest of said bonds as the same become due, to annually levy a tax upon all the taxable real and personal property in said

town in excess of the two per centum of the assessed valuation thereof, and the Common Council of said town has unlawfully and without right or authority by the provisions of said Ord. No. 62 of said town irrevocably bound and obligated said town to levy and collect such excess taxes.

XVIII.

That by said Ord. No. 64, said \$115,000 Municipal Electric Light & Power Plant Bonds have been made to mature serially in fixed annual amounts as follows: \$5,000 on July 1, of each of the years 1928 to 1942, inclusive, and \$40,000 on July 1, 1943, whereas said acts of Congress provided that said bonds shall mature twenty years from their date, with option reserved to said town to redeem the same prior to maturity in numerical order at the rate of \$5,000 per annum from and after the expiration of five years from date of bonds; that no authority exists by virtue of law or otherwise empowering said town or its Common Council to make said bonds mature serially in fixed amounts, as aforesaid, or to make said bonds mature in any manner other than that specifically stated in said acts of Congress. [7]

XIX.

That said Town of Petersburg has sold and is now about to issue and deliver the \$35,000.00 general bonds of said town authorized by the aforesaid special election to be issued for the purpose of constructing and equipping a public school building within the corporate limits of said town, and that said town has bound and obligated itself to levy

annually a tax upon all the taxable real and personal property in said town sufficient to pay the principal and interest of said school bonds as the same fall due.

XX.

That during the year ending March 15, 1923, the total receipts of said town from all sources amounted to the sum of \$33,323.53, which sum included general *general* taxes levied by said town in the sum of \$10,812.88, moneys received from the existing municipal light plant in the sum of \$9,452.19, license moneys in the sum of \$4,795.68, receipts from the water department in the sum of \$3,689.00 and other moneys received from municipal court fines, auto licenses, dog taxes, street and sewer assessments, and the operation of the city hospital; that during said year the total disbursements of said town amounted to \$29,903.56, including disbursements made for the operation of its existing municipal light plant, and water plant, the maintenance and operation of its city hospital, schools and fire department, the maintenance of streets, walks and sewers, the conduct of elections, the salaries of town officers and other miscellaneous expenses.

XXI.

That said town, its Common Council and its officers and agents threaten to, and will, unless enjoined from so doing by this Court: [8]

(a) Issue, sell and deliver said \$115,000 bonds, dated July 1, 1923, bearing 7% interest per annum, payable semi-annually, and maturing as follows:

\$5,000 on July 1st of each year of the years 1928 to 1942, both inclusive, and \$40,000 on July 1, 1943.

(b) Use the proceeds derived from the sale of said bonds to acquire real and personal property outside of its corporate limits for the construction of a municipal electric light and power plant, and will use such proceeds to construct a power plant and transmission lines outside of its corporate limits and to equip the same with all necessary machinery and appurtenances.

(c) Will sell to private individuals, firms and corporations electric energy generated by said power plant to be used and consumed outside the corporate limits of said town.

(d) Will issue, sell and deliver said \$115,000 bonds and thereby obligate said town and its Common Council and officers to levy and collect annually general taxes upon all the taxable real and personal property in said town (including the real and personal property of plaintiff) in excess of two per centum of the assessed valuation thereof.

(e) Will incur a municipal indebtedness by the issuance of said bonds in excess of any authority conferred upon it by law and will, in order to provide for the payment of the principal and interest of said bonds, annually levy general taxes upon all the taxable real and personal property in said town, including the real and personal property of plaintiff, in excess of the limitation upon municipal tax levies prescribed by law. [9]

XX.

That if said town and its Common Council and

municipal officers issue, sell and deliver said bonds, as aforesaid, plaintiff will suffer irreparable loss, damage and injury, and that plaintiff is without any speedy or adequate remedy at law.

WHEREFORE, plaintiff prays that defendant town and its Common Council and its municipal officers be permanently enjoined from issuing all or any part of said bonds, and that plaintiff may have such other relief as in the premises plaintiff is entitled to receive.

H. L. FAULKNER,
Attorney for Plaintiff.

The United States of America,
Territory of Alaska,—ss.

Paul Lund, being first duly sworn, on oath deposes and says: I am the plaintiff in the above and foregoing entitled action; that I have read the foregoing complaint and the same is true as I verily believe.

PAUL LUND.

Subscribed and sworn to before me this 11th day of August, 1923.

[Notarial Seal] HAROLD F. DAWES,
Notary Public, Territory of Alaska.
My commission expires July 2, 1927. [10]

Exhibit "A."

Copy of Act approved Sept. 29th, 1919.

An act to authorize the incorporated Town of Petersburg, Alaska, to issue bonds in any sum not

exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

Sec. 1. That the incorporated Town of Petersburg, Alaska, is hereby authorized and empowered to issue bonds in any sum not exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building.

Sec. 2. That before such bonds shall be issued a special election shall be ordered by the Common Council of the Town of Petersburg at which election the question of whether such bonds shall be issued shall be submitted to the qualified electors of said Town of Petersburg whose names appear on the last assessment-roll of said town for municipal taxation. Thirty days notice of such election shall be given thereof in a newspaper printed and published and of general circulation in said town before the date fixed for such election.

Sec. 3. That the registration for such election and the manner of conducting the same and the canvass of the returns of said election shall be, as near as practicable, in accordance with the requirements of law in general or special elections in said municipality, and said bonds shall be issued only upon condition that a majority of the votes cast at

such election in said town shall be in favor of issuing such bonds.

Sec. 4. That the bonds above specified, when authorized to be issued as hereinbefore provided, shall bear interest at a rate to be fixed by the Common Council of Petersburg not to exceed seven per centum per annum, payable semi-annually and shall not be sold for less than their par value with accrued interest and shall be in denominations not exceeding \$1,000.00 each, the principal to be due in twenty years from date thereof, and provided further, that the Common Council of the town may reserve the right to pay off said bonds in their numerical order at the rate of \$5,000.00 thereof per annum from and after the expiration of five years from their date. Principal and interest shall be payable in lawful money of the United States of America at the office of the town treasurer or at such bank in the City of New York, State of New York, or such place as may be designated by the Common Council of the Town of Petersburg, the place of payment to be mentioned in the bonds, provided further that each and every of such bonds shall bear the written signature of the Mayor and Clerk of said Town of Petersburg and also bear the seal of said town.

Sec. 5. That no part of the funds arising from the sale of said bonds shall be used for any purpose other than specified in this Act and such bonds shall be sold only when and in such amounts as the Common Council shall direct and the proceeds thereof shall be disbursed for the purposes hereinbefore

mentioned and under the order and direction of the said common council from time to time [11] as the same may be required for said purposes provided that not to exceed \$50,000.00 from the proceeds of the sale of said bonds shall be expended for the construction and installation of the electric light and power plant and not to exceed \$25,000.00 thereof shall be expended in the construction of the public school building.

Approved Sept. 29, 1919. [12]

Exhibit "B."

Act approved June 5th, 1920.

An act to amend an act entitled "an Act to authorize the incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building," approved September 29, 1919.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that section 1 of the act entitled "an Act to authorize~~d~~ the incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building" be, and the same is hereby, amended to read as follows:

“Section 1. That the incorporated Town of Petersburg, Alaska, is hereby authorized and empowered to issue bonds in any sum not exceeding \$150,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building.”

Sec. 2. That section 5 of the Act mentioned in the preceding section is hereby amended to read as follows:

“Section 5. That no part of the funds arising from the sale of said bonds shall be used for any purpose other than specified in this Act. Said bonds shall be sold only in such amounts as the common council shall direct, and the proceeds thereof shall be disbursed for the purposes hereinbefore mentioned and under the order and direction of said common council from time to time as the same may be required for said purposes; Provided, That not to exceed \$115,000.00 of the proceeds of the sale of said bonds shall be expended for the construction and installation of the electric light and power plant, and not to exceed \$35,000.00 thereof shall be expended for the construction of the public school building.”

Approved June 5, 1920. [13]

Exhibit “C.”

ORDINANCE No. 62.

An Ordinance Providing for a Special Election to be Held in the Town of Petersburg, Alaska, a

Municipal Corporation, to determine whether or not the said Town of Petersburg Shall, (a) Issue its Bonds in the Sum of Approximately Thirty-five Thousand Dollars for the Purpose of Constructing and Equipping a public School Building; and (b) Issue its Bonds in the Sum of Approximately One Hundred Fifteen Thousand Dollars for the Purpose of Constructing and Installing a Municipal Electric Light & Power Plant, or for Either of Said Purposes:

* * * * *

Whereas, the Town of Petersburg, Alaska, a Municipal Corporation in the Territory of Alaska, desires to construct and equip a Public School Building within its corporate limits, for the use of the said Municipality and its inhabitants, at an estimated total cost of approximately Thirty-five Thousand Dollars; and,

Whereas, The said Town of Petersburg desires and proposes to construct and install a Municipal Electric Light & Power Plant, to supply its inhabitants with light and power, at a cost of not to exceed One Hundred Fifteen Thousand Dollars; and,

Whereas, The said Town of Petersburg, a Municipal Corporation, desires to pay for the construction and equipment of the said Public School Building and for the Construction and Installation of said Municipal Electric Light & Power Plant by the issuance of General Bonds in the sum of Thirty-five Thousand Dollars and of One Hundred Fifteen Thousand Dollars, respectively, which said

bonds shall mature twenty years from the date thereof and shall bear interest at the rate of seven (7%) per cent per annum, payable semi-annually, on the fifteenth day of March and on the fifteenth day of September, in each year, both principal and interest payable at the office of the Municipal Treasurer of the Town of Petersburg, in the Town of Petersburg, Alaska; the right to call in and pay off the said bonds in their numerical order at the rate of five thousand dollars thereof per annum from and after the expiration of three years from their date, being especially reserved; and [14]

Whereas, by virtue of an Act of Congress approved September 29th, 1919, entitled "An Act to authorize the incorporated Town of Petersburg, Alaska, to Issue Bonds in any Sum not Exceeding Seventy-five Thousand Dollars for the Purpose of Constructing and Installing a Municipal Electric Light & Power Plant, and for the Construction of a Public School Building," as amended by an Act of Congress, approved June 5th, 1920, entitled, "An Act to Amend an Act Entitled, 'An Act to Authorize the Incorporated Town of Petersburg, Alaska, to Issue Bonds in any Sum not Exceeding \$75,000.00 for the Purpose of Constructing and Installing a Municipal Electric Light & Power Plant and for the Construction of a Public School Building,'" THE SAID MUNICIPAL CORPORATION IS AUTHORIZED TO ISSUE THE SAID BONDS, provided that such issuance be approved by a majority of the electors residing

within the corporate limits of the said town, at a special election to be held for such purpose, as provided in said Act as amended;

Now, therefore; BE IT ORDAINED BY THE COMMON COUNCIL OF THE TOWN OF PETERSBURG:

1st. That a Special Election be held in the Town of Petersburg, Alaska, on Monday, the 30th day of April, 1923, between the hours of 8:00 A. M. and 7:00 P. M. of said day, at which said election all the qualified electors of the incorporated Town of Petersburg, Alaska, are invited to vote on the following two questions, or propositions, to wit:

A. Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding thirty-five thousand dollars, for the purpose of constructing and equipping a Public School Building within the corporate limits of said town;

B. Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding one hundred fifteen thousand dollars, for the purpose of constructing and installing a Municipal Electric Light & Power Plant.

2d. That the manner of conducting and holding said election, the registration of voters, and the canvass of the returns shall, as nearly as practicable, be in accordance with the provisions of the [15] election ordinance now in force and effect within the corporate limits of the said Town of Petersburg; that all the territory embraced within

the corporate limits of the said Town of Petersburg shall constitute one voting precinct; and that the polling place in the said voting precinct shall be in the City Hall, also known as the "Fire Hall," situated within the said corporate limits.

3d. That the Municipal Clerk of the said Town of Petersburg, be, and he hereby is, empowered to issue and post a public notice in three public places within the corporate limits of the said town, and that he cause said notice to be printed and published in the Petersburg Weekly Report, a newspaper printed and published and of general circulation in the said town, and that said notice be posted and published, as aforesaid, at least thirty days prior to the date of said election; that the said notice shall be, substantially, in the following form:

NOTICE OF SPECIAL ELECTION.

To the Electors of the Town of Petersburg a Municipal Corporation:

Notice is hereby Given, that pursuant to an Act of Congress, entitled, "An Act to Authorize the Incorporated Town of Petersburg, Alaska, to Issue Bonds in Any Sum, not exceeding \$75,000, for the Purpose of Constructing and Installing a Municipal Electric Light and Power Plant, and for the Construction of a Public School Building," approved September 29, 1919, as amended by an Act of Congress entitled, "An Act to Amend an Act entitled, 'An Act to authorize the Incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000 for the purpose of con-

structing and installing a Municipal Electric Light and Power Plant and for the construction of a Public School Building,' approved September 29, 1919," and Ordinance No. 61, passed by the Common Council of the Town of Petersburg, Alaska, a Municipal Corporation, at its regular meeting held on the 19th day of March, 1923, a SPECIAL ELECTION will be held in the said Town of Petersburg, Alaska, on the 30th day of April, 1923, [16] between the hours of 8:00 A. M. and 7:00 P. M. of said day, at which election the electors of and in the said incorporated Town of Petersburg are invited to vote on the two following questions or propositions, to wit:

(A) Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding thirty-five thousand dollars, for the purpose of constructing and equipping a Public School Building within the Corporate Limits of said Town;

(B) Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding a hundred fifteen thousand dollars, for the purpose of constructing and installing a Municipal Electric Light & Power Plant.

That the entire area embraced within the corporate limits of the said Town of Petersburg shall constitute one voting precinct, and that the polling place shall be in that certain public building known as the "City Hall" or "Fire Hall," in the said Town of Petersburg. All persons who are citizens of the United States, twenty-one years of

age or over, who have been residents of Alaska for the period of one year and of the Town of Petersburg for six months immediately preceding the date of said election, who have duly registered as provided by the Ordinance of the Town of Petersburg, and whose names appear on the last Assessment Roll of the said Town for Municipal Taxation are qualified to vote at said election.

Dated this 19th day of March, 1923.

TOWN OF PETERSBURG,

By Its Common Council.

ED. LOCKEN,

Mayor.

HAROLD F. DAWES,

Clerk.

4th. That the Municipal Clerk shall cause the necessary ballots to be prepared and delivered to the Judge of Election selected and appointed by the Common Council as provided in the election ordinance now in force in the said Town of Petersburg; and he shall [17] before the commencement of the said election, file in his office due and lawful proof of the posting of the Notice of Special Election heretofore referred to, and also due proof of the publication of said notice in said newspaper; such proof to be made by the person posting said notices, and the publisher of the said newspaper, respectively.

5th. The Judges of Election, under their hands and seals shall canvass the returns and prepare their return; and in such return they shall state the number of votes cast for or against each pro-

position separately; such return shall be duly filed with the Municipal Clerk, and by him shall be filed and kept among the permanent records of the Town.

6th. That if a majority of the qualified voters of the said town of Petersburg, at the said election, shall declare that they are in favor of the issuance of such bonds for either or both of said propositions, thus submitted to them for their determination, the Common Council of the Town of Petersburg shall formulate plans and make arrangements for the sale of such bonds the issuance of which has been decided upon at the said election.

7th. That the bonds above specified shall bear interest at the rate of seven per cent (7%) per annum, payable semi-annually, and shall not be sold for less than their par value with accrued interest, and shall be in denominations not exceeding \$1,000.00 each, the principal to be due in twenty years from and after the date thereof; provided, however, that the Common Council of the Town of Petersburg reserves the right to pay off such bonds in their numerical order at the rate of \$5,000.00 thereof per annum, from and after the expiration of five years from their date. Principal and interest shall be payable in lawful money of the United States of America, at the office of the Town Treasurer of the Town of Petersburg, at Petersburg, Alaska; and, provided [18] further that each and every bond shall have the signature of the Mayor and Clerk of the said Town of Petersburg, and shall also bear the seal of the said Town.

8th. That the funds arising from the sale of the said bonds shall be used for the purpose specified herein and for no others; all in conformity with the provisions of the Acts of Congress approved September 29th, 1919, and June 5th, 1920, respectively.

An emergency is hereby declared to exist, and this Ordinance shall be in full force and effect from and after its passage and approval.

THE COMMON COUNCIL OF PETERSBURG.

[Seal] By ED. LOCKEN,
President of the Common Council and Mayor of
Petersburg, Alaska.

Passed and approved this 19th day of March, 1923.

Attest:

HAROLD F. DAWES,
Municipal Clerk. [19]

Exhibit "D."

Ordinance No. 63.

An ordinance to amend section seven (7) of ordinance No. 62.

BE IT ORDAINED BY THE COMMON COUNCIL OF THE TOWN OF PETERSBURG, ALASKA:

Section 1. That section seven (7) of ordinance No. 62 of the Town of Petersburg, be amended to read as follows:

Section 7. That the bonds above specified shall bear interest at the rate of seven per cent per annum, payable semi-annually, and shall not be sold

for less than their par value with accrued interest, and shall be in denominations of \$500.00 or \$1000.00 or both each; the said bonds shall mature as follows: \$5000.00 on the first day of July in each year, commencing July 1st, 1928, to July 1st, 1942, both inclusive; \$75,000.00 on the first day of July, 1943. Principal and interest shall be payable in lawful gold coin of the United States of America, of the present standard of fineness and weight, at the office of the Guaranty Trust Company, of New York City; and provided further that each of said bonds shall bear the signature of the Mayor and Municipal Clerk of said Town of Petersburg, and shall also bear the seal of the said town."

Section two. This ordinance to be in full force and effect from and after its passage and approval.

Passed and approved this 18th day of June, 1923.
THE COMMON COUNCIL OF THE TOWN OF
PETERSBURG, ALASKA.

By T. S. ELSEMORE,

Mayor of the Town of Petersburg.

Attest: [Seal] HAROLD F. DAWES,
Municipal Clerk. [20]

Exhibit "E."

Ordinance No. 64.

An ordinance providing for the issuance, sale, maturity, and redemption of Municipal Electric Light & Power Bonds, in a sum not exceeding one hundred and fifteen thousand dollars, to be issued

and self for the purpose of constructing and installing a Municipal Electric Light and Power Plant.

WHEREAS a call for a special election for the purpose of determining, among other things, whether or not the Town of Petersburg, in the Territory of Alaska, a municipal corporation, should issue its bonds in a sum not exceeding one hundred and fifteen thousand dollars for the purpose of constructing and installing a Municipal Electric Light and Power Plant, was duly issued as provided by ordinance No. 62, adopted and approved by the Common Council of the Town of Petersburg, Alaska, on the 19th day of March, 1923; and

WHEREAS such call and notice of election was posted in three public places within the corporate limits of the said Town of Petersburg and was duly published in the "Petersburg Weekly Report," a newspaper published at and of general circulation in said Town of Petersburg, all as appears from an examination of the affidavits of posting and publishing duly filed in the office of the municipal clerk; and

WHEREAS pursuant to said call and notice an election was duly held and had in accordance therewith, and the Judges and Clerks of election having made and filed their minutes and return of said election, from an examination of which it appears that at said special election there were cast seventy-two (72) votes upon the proposition as to whether or not the Town of Petersburg shall issue bonds in the sum of approximately and not exceeding one

hundred and fifteen thousand dollars for the construction and installation of a Municipal Electric Light and Power Plant; that seventy-one (71) votes were cast in favor of the proposition and one (1) vote was cast against the said proposition, all of which has been duly considered by the Common Council of the Town of Petersburg:

NOW THEREFORE BE IT ORDAINED BY THE COMMON COUNCIL OF THE TOWN OF PETERSBURG:

1st. [21] 1. That a bonded indebtedness of the Town of Petersburg be, and the same is hereby, declared, authorized and created, to the amount of \$115,000.00, for the purpose of providing funds and money for the erection, construction, installation and equipment of an Electric Light & Power Plant at and near Petersburg, Alaska.

2. That the said bonded indebtedness hereby authorized and created shall be represented by one hundred and fifteen bonds of the said Town of Petersburg, Alaska, in denominations of \$1,000.00 or \$500.00 as the case may be each, bearing date the first day of July, 1923; that the said bonds shall bear interest at the rate of 7% per cent annum from their date until paid, payable semi-annually, and shall have appropriate coupons attached for each interest payment; that both the principal and interest shall be payable in United States Gold Coin of present standard of weight and fineness; that the said bonds shall be numbered from one (1) to one hundred fifteen (115) or one (1) to two hundred thirty (230) as the case may be, both in-

clusive, for said aggregate principal sum of \$115,000.00; that said bonds shall mature as follows:

\$5,000.00 each year, July 1st, 1928 to 1942 (inclusive);

\$40,000.00 each year, July 1st, 1943;

said bonds to be retired and paid off in their numerical order, at par and accrued interest to date of retirement.

3. The retirement and redemption of said bonds shall be made as follows: The said Town of Petersburg shall advertise at least once a week for four successive calendar weeks, in a newspaper published either at Petersburg or Juneau, Alaska, a notice addressed to the holders of bonds to be paid off and retired (but said town shall not be required to state in said notice the individual name of each person or corporation holding such bonds or any of them) specifying the distinctive numbers of the bonds to be paid off and retired, and stating that on a date specified in such notice the said specified [22] bonds will become and will be due and payable at par with interest accrued to the date of payment specified in such notice.

That if any holder of any bond thus to be paid off and retired, after such notice has been given, shall fail or neglect to present any bond in such notice specified, such bond shall cease to bear interest.

That the said bonds shall be signed by the Mayor and the Municipal Clerk of the said Town of Petersburg, and the seal of said town shall be affixed thereto, and the interest coupons attached thereto

evidencing the interest to become due thereon, shall be signed by said Mayor and Municipal Clerk, or their facsimile signatures may be attached thereto.

4. That the said bonds shall be sold, negotiated and disposed of by the said Town of Petersburg, through its Common Council, to Messrs. Hubbell and Waller, a copartnership composed of C. S. Hubbell and H. H. Waller of Seattle, Washington, at par with accrued interest, from time to time as may be required, to raise funds and money for the construction, erection, installation and equipment of said Electric Light & Power Plant;

That no part of the funds arising from the sale of any of said bonds shall be used for any purpose other than the construction, erection, installation and equipment of said Electric Light & Power Plant, and only such amounts of said bonds shall be sold as the Common Council of said Town of Petersburg may from time to time direct.

5. That the forms of the bonds of the coupons to be attached thereto are to be severally and respectively, save and except as to the date of maturity therein specified, substantially as follows:
[23]

No. ————— \$1000.00

UNITED STATES OF AMERICA.

Territory of Alaska.

Town of Petersburg.

Light & Power Bond of 1923.

KNOW ALL MEN BY THESE PRESENTS,
That the Town of Petersburg, Territory of Alaska,
a municipal corporation, duly organized and exist-

ing under and by virtue of the laws of the United States, acknowledges itself to owe, and for value received promises to pay to bearer the sum of One Thousand Dollars (\$1000.00) on the first day of July, 19—, together with interest thereon from date hereof until paid at the rate of seven (7%) per/cent per annum, payable semi-annually on the first days of January and July in each year, as evidenced by and upon presentation and surrender of the annexed interest coupons as they severally become due, both principal and interest payable in gold coin of the United States of America of present standard of weight and fineness at the office of The Guaranty Trust Company in the city of New York. For the prompt payment of this bond, both principal and interest, the full faith, credit and resources of said town are hereby irrevocably pledged.

This bond is a part of an issue of bonds in the principal sum of One Hundred *Fifteen* (\$115,000.00) Dollars, all of said bonds being of like tenor, amount, date and effect, except as to the times of maturity, which are as follows:

Bonds Nos. 1 to 5	(inclusive),	July 1, 1928,
Bonds Nos. 6 to 10	“	July 1, 1929,
Bonds Nos. 11 to 15	“	July 1, 1930,
Bonds Nos. 16 to 20	“	July 1, 1931,
Bonds Nos. 21 to 25	“	July 1, 1932,
Bonds Nos. 26 to 30	“	July 1, 1933,
Bonds Nos. 31 to 35	“	July 1, 1934,

[24]

Bonds Nos. 36 to 40,	(inclusive),	July 1, 1935,
Bonds Nos. 41 to 45	“	July 1, 1936,
Bonds Nos. 46 to 50	“	July 1, 1937,

Bonds Nos. 51 to 55	“	July 1, 1938,
Bonds Nos. 56 to 60	“	July 1, 1939,
Bonds Nos. 61 to 65	“	July 1, 1940,
Bonds Nos. 66 to 70	“	July 1, 1941,
Bonds Nos. 71 to 75	“	July 1, 1942,
Bonds Nos. 76 to 115	“	July 1, 1943,

Which said bonds are to be used for a strictly municipal purpose, to wit, the construction, erection, installation and equipment of a municipal electric light and power plant in the said Town of Petersburg, Alaska, all as provided by the Act of Congress approved September 29, 1919, as amended by the Act of Congress approved June 5, 1920, authorizing the issuance of said bonds for the purpose of constructing, erecting, installing and equipping said Municipal Electric Light & Power Plant, and as provided by Ordinance No. 62 of said town, passed and approved March 19, 1923, and this bond is issued pursuant to and in full compliance with the Laws of the United States and the Territory of Alaska, and of the Ordinance and resolutions of the said Town of Petersburg.

It is hereby recited, certified and declared that all Acts, Conditions and Things required by the Laws of the United States and of the Territory of Alaska, and of the Ordinances of said Town of Petersburg to exist and be done precedent to and in the issuance of this bond have existed and been done in due regular form, time and manner, as required by the law, and that the entire indebtedness of said town, including this bond, does not exceed any limitation prescribed by the laws of the United States or the Territory of Alaska.

IN WITNESS WHEREOF, The Town of Petersburg, Alaska, has [25] caused this bond to be signed by its Mayor and attested by its Municipal Clerk, and has caused its corporate seal to be hereto affixed and the interest coupons attached to be signed and sealed with the fac-simile signatures of said officers and the seal of said Town, this 1st day of July, 1923.

TOWN OF PETERSBURG, ALASKA.

By _____,

Its Mayor.

Attest:

_____,

Its Municipal Clerk.

No. —.

\$35.00

INTEREST COUPON.

On the first day of —, 19—, the Town of Petersburg, Alaska, will pay to bearer, at the office of Guaranty Trust Company, in the City of New York, the sum of Thirty-five (\$35.00) Dollars, in gold coin of the United States of America, such sum being the semi-annual interest due on that date on its general Electric Light & Power Bond dated July 1st, 1923, No. —.

TOWN OF PETERSBURG, ALASKA.

By _____,

Its Mayor.

Attest:

_____,

Its Municipal Clerk. [26]

6. That said Town of Petersburg does hereby appoint The Guaranty Trust Company, of the City

of New York, its agent, where bonds and interest coupons may be presented for payment, and where notices and demands in respect to such bonds and interest coupons may be served.

7. That the said Town of Petersburg does hereby create and establish a sinking fund for the purpose of the payment of the principal of said bonds and the interest thereon as they mature and accrue; that the said Town of Petersburg shall annually levy a tax upon all the real and personal property situate within the corporate limits of the said town, subject to taxation, in amount sufficient to pay the interest and installments of principal due for the ensuing year, and such amounts as may be required for the payment of such interest and installments shall be kept and remain in said sinking fund and shall be used and applied to the payment of such interest and installments, and no part of such sinking fund shall be applied to any other purpose whatsoever.

8. This Ordinance shall be in full force and effect from and after its passage and approval.

Passed and approved this 18th day of *Junem* 1923.

THE COMMON COUNCIL OF THE
TOWN OF PETERSBURG, ALASKA.

By T. S. ELSEMORE,
Its Mayor.

Attest: [Seal] HAROLD F. DAWES,
Its Municipal Clerk.

Filed in the District Court Territory of Alaska,
First Division. Aug. 15, 1923. John H. Dunn,
Clerk. By N. B. Cook, Deputy. [27]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2322—A.

PAUL LUND,

Plaintiff,

vs.

TOWN OF PETERSBURG, a Municipal Cor-
poration,

Defendant.

Demurrer.

Comes now the defendant above-named and demurs to the complaint filed herein, and for cause of demurrer alleges that the said complaint does not state facts sufficient to constitute a cause of action.

HENRY RODEN,

Defendant's Attorney.

Received a copy of within demurrer this 25th day of August, 1923.

Plaintiff's Attorney.

Filed in the District Court Territory of Alaska,
First Division. Aug. 25, 1923. John H. Dunn,
Clerk. By N. B. Cook, Deputy. [28]

In the United States District Court for the Territory of Alaska, First Division.

PAUL LUND,

Plaintiff,

vs.

TOWN OF PETERSBURG, a Municipal Corporation,

Defendant.

Memorandum Opinion on Demurrer to the Complaint.

By an Act of Congress entitled, "An Act to Authorize the Incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building" approved September 29, 1919 (41 Stat. L. 289) and amended by an act increasing the authorization for the bond issue to \$150,000 approved September 5, 1920 (41 Stat. L. 981), the common council of the Town of Petersburg, with the assent of a majority of the qualified voters thereof, was authorized to issue bonds in the sum of \$115,000 for the construction and installation of an electric light and power plant, and bonds in the sum of \$35,000 for the construction of a schoolhouse.

Pursuant to the authority contained in said act, the common council of the town, the assent of the majority of the voters of the town, given at a

special election held for the purpose of submitting the question to the electors as provided in the act, having been obtained, on June 18, 1923, passed an ordinance (No. 64) providing for the issuance, sale, maturity and redemption of municipal electric light and power bonds in a sum [29] not exceeding \$115,000 to be issued and sold for the purpose of constructing and installing a municipal electric light and power plant for the city. This ordinance provided that the bonds be sold to Hubbell & Waller, a copartnership, at par and accrued interest, and delivered from time to time as required for the construction of the plant; in denominations of \$1,000 each, dated July 1, 1923, bearing interest at 7 per cent payable semi-annually and maturing in the order of their number, the lowest first; and that \$5,000 thereof should mature on July 1st of each of the years 1928 to 1942 inclusive, and \$40,000 on July 1st, 1943. It was further provided by the ordinance that a sinking fund be established for the purpose of the payment of the principal and interest on the bonds as they respectively accrue and that there be an annual tax levy upon the real and personal property within the corporate limits of the town for the payment of the principal and interest on the bonds as such principal and interest would annually accrue, the same to be paid and kept in the sinking fund and applied to such purpose and to no other purpose whatever.

On August 16, 1923, the plaintiff, alleging that he is a resident and taxpayer of the Town of Pe-

tersburg, brought this action to enjoin said town from the sale and disposal of the bonds so authorized, alleging the foregoing facts and further that the population of the town is approximately 1,000 and that the total assessed value of taxable real and personal property within the corporate limits as shown by the last assessment was \$598,780; that the said town proposes to and will construct its power-house and plant on lands to be acquired without the corporate limits of the town at a distance of fifteen miles therefrom and will transmit the electric power generated at such plant over rights of way to be acquired, to the town [30] by means of transmission lines; and that the town proposes to and will sell a substantial portion of the power generated at its power plant so to be constructed to various private persons for consumption and use outside the corporate limits of the town; that the town has sold and is about to deliver the \$35,000 bond issue authorized by the Act of Congress for the construction of the public school building and has obligated itself to levy an annual tax upon the taxable property in the town to pay the principal and interest on such bonds as the same accrue; that the corporation has not power or authority to levy any annual tax in excess of two per cent (2%) of the assessed valuation of the real and personal property in the town in any one year, and that, if the said bonds are issued, it will be necessary for the corporate authorities, in order to enable the town to retain its corporate existence, and carry on its regular functions and maintain its public school, to annu-

ally levy a tax on the real and personal property in the town in excess of two per cent (2%) of the assessed value thereof; that the town authorities are without power and authority to bind the town irrevocably to levy and collect such excess tax, as provided by Ordinance No. 64. That during the year ending March 15, 1923, the total revenue of the town was \$33,323.53 and the total disbursements on account of the running expenses of the town were \$29,903.59, and unless enjoined the town will issue and deliver said bonds amounting to \$115,000 maturing \$5,000 on July 1st of each of the years 1928 to 1942 inclusive, and \$40,000 on July 1st, 1943; that it will use the proceeds of the said bonds to acquire real and personal property outside the corporate limits of the town for the construction of its power plant; that it will sell to private individuals electric power generated at such plant, to be used outside the corporate limits of the town; that it will obligate the town to levy and collect annual taxes upon the real [31] and personal property of the town in excess of two per cent (2%) of the assessed value thereof, and in order to provide for the payment of the principal and interest on said bonds as the same may accrue, it will incur a municipal indebtedness in excess of the authority conferred upon it by law.

To this complaint (the substance of which is given above) the defendant has interposed a general demurrer and the same was argued before the Court by the respective counsel,—H. L. Faulkner,

Esq., appearing for the plaintiff and Henry Roden, Esq., appearing for the defendant.

The plaintiff bases his application for an injunction on four main grounds and the demurrer of the defendant, being as to the sufficiency of the whole complaint, all of these grounds require consideration and they are in substance as follows:

1. That the corporation has no authority to acquire property outside of the corporate limits of the town for its proposed electric light and power plant;

2. That it is not authorized or empowered by its charter, or otherwise, to sell or dispose of the electric power generated by its proposed plant to private parties for use outside its corporate limits;

3. That the town authorities have no power or authority under the Act of Congress to provide for the levy of a tax to meet the interest on said bonds as this interest may accrue, or to provide for a sinking fund for the settlement of the principal of the bonds at their maturity,—

(a). Because the act authorizing the issue does not specifically so provide;

(b). Because such tax will result in a levy in excess of the two per cent (2%) on the assessed value of the taxable [32] property of the town as limited by the Organic Act of the Territory;

(c). Because the obligation to levy a tax and provide a sinking fund will cause the town to exceed its statutory limit of indebtedness; and

4. That the town council is without authority to bind itself to redeem any of the bonds issued

before the expiration of the twenty years provided for in the Act.

Considering the first cause, in my opinion, the authority of the municipality to acquire property outside of the corporate limits of the town for municipal purposes is implied in the general power granted it. In discussing this proposition, it is said by the author in McQuillin on Municipal Corporations (vol. III, section 1108) that "notwithstanding earlier rulings to the contrary, including *dicta* probably influenced by an eminent author on municipal corporations, it is believed that the rule, supported by the weight of authority as well as by the better reasoning, is that a municipal corporation, where not expressly prohibited, may purchase real estate outside of its corporate limits for legitimate municipal purposes. * * * At present there can be no question that a municipal corporation may purchase and hold land outside its limits for certain necessary purposes such as a cemetery, or a pest house, or a water supply, or the like." Citing *Schneider vs. Menasha*, 118 Wis. 298, 95 N. W. 94; *Somerville vs. Waltham*, 170 Mass. 160, 48 N. E. 1092; *Hewitt vs. Jacinto P. R. Irri. Dist.*, 124 Cal. 186, 56 Pacific 893; *Re New York*, 99 N. Y. 569, 2 N. E. 642; *Champaigne vs. Harmon*, 98 Ill. 491, 494; *Wilson vs. Boise City*, 6 Idaho, 391, 55 Pacific 887; *Hibbard vs. Barker*, 84 Kan. 848, 115 Pac. 561. [33] But this question is settled by positive statutory enactment in this Territory. By our statute (Session Laws 1919, Chap. 50, Sec. 4) power was expressly given to municipal corpora-

tions to condemn real property under the Eminent Domain Act, for municipal purposes outside of the corporate limits of the city; thus there was impliedly given power to a municipality to acquire real property by purchase and express power was given by the statute of 1923 (Session Laws 1923, Chap. 97, Sec. 16) where it is provided that,

“For the purpose of installing, acquiring, owning or operating plants for the supply of water, light, heat or power to the city or its people * * * a municipal corporation shall have the power to acquire and own property outside of the boundaries of the city and shall have jurisdiction by proper ordinance * * * to protect the sources of supply of water for the city from contamination, * * * .”

This settles the question as to the authority of the city to purchase and hold real estate for municipal purposes outside of its corporate limits; and the complaint of the plaintiff on that ground is without foundation.

The second ground on which the plaintiff alleges that he is entitled to the injunction is that the city is not authorized to sell electric power generated by its municipal plant to private individuals for use outside of the corporate limits of the city. This ground is also without foundation for the relief asked. The contention is based upon the future disposition of the power when the plant for which the bonds have been issued shall have been completed and afford at the present time no ground for an injunction. What future common

councils may do in this regard is not within the power of the plaintiff to state; nor can the terms of any contract which the authorities of the town may enter into be set forth by him as a ground for enjoining the sale of the bonds; therefore, a discussion on this point becomes purely academic. The allegation contained in the complaint [34] that the city will sell a substantial portion of the electric energy generated in its plant for use outside of the city limits, does not recite whether it will sell its surplus electric power after the city has been fully supplied with power and light, or whether it will dispose of power to the detriment of the inhabitants, its customers within the city. The allegation is that it proposes to and will sell a substantial portion of its power outside the city limits.

It seems to me that if the purpose of an electrical plant is to supply the individuals of a municipal corporation with light and power and, in the generation of electricity for its consumers within the city, should a surplus of light or power be generated, the municipal authorities may sell such surplus for use without the corporation. Common sense dictates that the surplus should not be allowed to run to waste and, as a matter of business, it would seem to be the duty of the municipal authorities to secure all the revenue possible from its plant provided that the primary purpose of supplying the inhabitants of the city had been fulfilled and no expense by way of extensions or enlargements of its plant with a view to supplying power to parties outside the corporate limits be incurred.

While it is generally held that a municipality has no implied authority to furnish light or power beyond its territorial limits, yet many well considered cases hold that having acquired energy in the shape of light and power for municipal purposes in excess of its present corporate needs, it is its duty to apply the surplus for the benefit of its inhabitants. See *Overall vs. Madisonville*, 102 S. W. 278; *Pikes Peak Power Co. vs. Colo. Springs*, 105 Fed. 1; *Mulligan vs. Miles City*, 153 Pac. 276; *Rogers vs. Wickluc*, 94 S. W. 24; [35] *Colorado Springs vs. Colorado City*, 94 Pac. 316; *Henderson vs. Young*, 83 S. W. 583.

The third ground for injunction is that the city has not power or authority to provide for the levy of a tax to meet the interest on the bond issue, and no authority to provide for a sinking fund. To substantiate this point it is urged that the Act of Congress does not provide for the levy of such tax nor provide for a sinking fund; it is true that the Act does not provide for a sinking fund, nor does it provide for a levy of a tax on property within the municipality to redeem the bonds. Congress, by the Act, authorized the contracting of the indebtedness for the purposes stated, and provided no method for the repayment of the indebtedness. Impliedly that was left to the municipal authorities. As was said in *Ralls County Court vs. Douglas*, 105 U. S. 733, 734, "in such case, the power to tax is necessarily an ingredient of the power to contract. When authority is granted by the legislative branch of the government to a municipality

or a subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy a tax sufficient to meet at maturity the obligation so incurred is conclusively implied unless the law which confers the authority or some general law in force at the time clearly manifests a contrary intention."

Ottawa vs. Carey, 108 U. S. 122;

Quincy vs. Jackson, 113 U. S. 337;

Scotland Co. vs. Hill, 140 U. S. 44;

Breckenridge vs. McCracken, 61 Fed. 196;

Rose vs. McKie, 145 Fed. 590;

United States vs. Saunders, 124 Fed. 128,

and numerous other state and federal decisions.
[36]

It is further urged that there is no provision for a sinking fund in the Act of Congress, and that the action of the common council in providing for a sinking fund and annual taxation to create the same is invalid. It is clear to me that the authority for the common council to create such a fund is implied by the act. If the power to tax is a necessary ingredient of the power to contract an indebtedness of the nature before us, the power to provide for the raising of the tax is implied.

That Congress had in view the progressive redemption of the bonds is certain since in the Act it is provided that the common council might reserve to itself the right of redemption at the rate of \$5,000 annually after five years from the date of issue of the bonds. This option having been exercised by the common council it is clear that a fund

for such redemption must be provided for, and that such fund, if the option was exercised, was in contemplation by Congress. There is also abundant authority for the proposition that in such case the power to create a sinking fund is implied.

A statute authorizing a bond issue need not itself make provision for a sinking fund; the power is impliedly conferred. McQuillin on Municipal Corporations, Vol. V, Sec. 2345, Note.

Vallely vs. Park Commissioners, 111 N. W., 615;

First National Bank vs. Swenson, 210 Pac. 900;
Abbott on Municipal Corporations, Secs. 224–305.

It is further urged that the levy of an annual tax to pay interest on the bonds and provide a sinking fund for the redemption of the bonds will either result in a levy in excess of two per cent on the assessed valuation of the taxable property of the town which is the limit of taxation for any purpose [37] fixed by the Organic Act; or, if kept within that limit will so reduce the fund applicable to the ordinary running expenses of the town that its corporate existence will be imperilled, or the town will be compelled to go into debt beyond its statutory limit, and therefore, that the bond issue and the ordinance providing for the levy of the tax is void.

To this end, the plaintiff alleges that the total revenues of the town for the year ending March 15, 1923, were \$33,323.53; that the current expenses were \$29,903.59, leaving an approximate balance of excess revenue of \$3,420 from which excess the in-

terest on the bond issue of \$35,000 for school purposes and the sinking fund provided by the ordinance must be paid, leaving the interest and sinking fund for the bonds in question to be raised by taxation. This proposition is in my opinion the most serious of those presented in the complaint.

The Organic Act (24 Stat. L., 170, Sec. 9) prescribes certain limitations on municipal corporations of the Territory; among others are the following applicable to this proposition:

“Nor shall the Territory or any municipal corporation therein have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or any municipal division thereof; nor to pledge the faith of the people for any loan, directly or indirectly; nor to create or assume any indebtedness except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the * * * municipality for that year including as a part of such income appropriations then made by Congress and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and not already pledged to prior indebtedness; * * * *nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per cent of the assessed valuation of the property within the town in any one year.*”

Giving the last clause of the limitation of the power of taxation the construction that the town is limited to a tax of two per cent for all purposes upon the assessed valuation of the property within the town, it is clear that the town to raise by [38] taxation the interest on the \$115,000 bond issue at 7% and provide a sinking fund of \$5,000 annually would, after paying the current expenses of the town as enumerated in the complaint, be compelled to levy a tax in excess of the limitation so provided; but it is not shown by any allegation of the complaint that it will be necessary to levy a tax to pay all or any considerable proportion of the interest as it accrues or any large proportion of the sinking fund provided for in the ordinance. The amount of the tax, if any is to be levied, is a matter of future computation and it is impossible for plaintiff or anyone else to say at this time that the revenues of the town will be insufficient to meet the interest payments, provide for a sinking fund and meet the current expenses. The provision for a tax levy to meet the annual expenses incorporated in the ordinance as well as the sinking fund for the gradual redemption of the authorized bonded indebtedness is a meritorious precautionary measure impliedly authorized by the Congressional Act permitting the bond issue and, in my judgment, is no ground for enjoining the sale of the bonds. The town undoubtedly has a right to anticipate that there will be increased revenues from the greater facilities provided by the proposed light and power plant, and the sale of light and power therefrom,

as well as that there shall be increased revenues from the property taxation but, aside from this, I am of the opinion that under the numerous state and federal authorities, the power is given the municipality to exceed the tax limit of two per cent of the assessed value of the taxable property of the town by the act authorizing the bond issue.

Congress, by the Organic Act, denied authority to the municipalities in general to create or assume a bonded indebtedness, to borrow money or pledge the faith of the people for any loan; or create or assume any indebtedness except for actual [39] running expenses, and limited that indebtedness to current revenue. It denied authority to levy a tax for any and all purposes in excess of two per cent of the assessed value of the taxable property in any one year. These provisions were general in their nature and applicable to all municipalities of the Territory.

By its special act, it authorized the Town of Petersburg to create the bonded indebtedness, to pledge the faith of its people for its repayment; to create an indebtedness other than for current running expenses in excess of its limit, and unless the limitation of the amount of excess be controlling, impliedly authorized the town to levy a tax to meet the indebtedness so created.

If there was a constitutional limitation on the power of the city to levy taxes, there would be a different question; but in this case the same authority which, by general law, provided the limitation, by special act authorized the issue of the

bonds and provided no means for the payment of principal and interest.

Considering the limitations provided in the Organic Act with the limitation in the amount of taxation, I am of the opinion that the tax limitation is impliedly repealed by the special authority granted the municipality to issue the bonds for the reason that the special authority to contract included the power to levy taxes for the purpose of complying with the contract even though the amount of such taxes be beyond the general statutory limitation.

Brooks vs. Memphis, Federal Cases 1954;
United States vs. Howard County Court, 2 Fed.

1;

People vs. Rigney, 63 Cal. 296;

Dillon vs. Aurora, 114 Ill. 138, 28 N. E. 461.

[40]

The power of officers of a municipality to levy sufficient taxes to pay its bonds is a legal inference from the authority of the city to issue its bonds, in the absence of any limitation or inhibition in the act which created the power, in the general law or the Constitution.

Loan Association vs. Topeka, 20 Wall. 653;

United States vs. New Orleans, 98 U. S. 381,
393;

Ralls Co. Court vs. U. S., 105 U. S. 733, 735,
736.

If the intent of Congress was to limit the payment of the bonds to current revenue or revenues derived from the sale of the electric light and en-

ergy, it surely would have so provided in the statute authorizing the issuance of the bonds. Presumably Congress was aware of the limitation in the Organic Act, and when authority was granted to issue the bonds it had that in view, as well as the decision of the Supreme Court that there impliedly must be a provision for payment by taxation, as was said by Mr. Justice Miller in *Loan Association vs. Topeka*, *supra*, "it follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can be lawfully levied to pay the debt, the contract is void for want of authority to make it."

No presumption can be made that Congress in authorizing the issue of the bonds had any other view than that provision for payment of the bonds should be made by the city by taxation, even though by that provision special taxes be levied which might exceed the general statutory limitation.

The other ground for enjoining the issuance of the bonds that the town would by the issuance thereof and providing for a sinking fund, exceed the statutory limit of indebtedness, and that the Common Council had no authority to provide a sinking fund, are without merit. As to the first, the limit of [41] indebtedness clause is repealed by the act allowing the bond issue in that such limitation refers to indebtedness for current expenses; and as to the latter, authority is expressly given to the common council by the act authorizing the issue of the bonds at its option to provide for

redemption of the bonds after five years from their date at the rate of \$5,000 annually.

The conclusion which I have reached after a careful consideration of the complaint is that there is no ground set forth therein which would justify the Court in enjoining the issuance and sale of the bonds described therein, and therefore, the demurrer should be sustained.

THOS. M. REED,
District Judge.

Dated, Juneau, Alaska, August 28, 1923.

Filed in the District Court, Territory of Alaska,
First Division. Aug. 30, 1923. John H. Dunn,
Clerk. [42]

In the District Court for the Territory of Alaska
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

Order Sustaining Demurrer.

This cause came on regularly to be heard on the 25th day of August, 1923, upon the general demurrer interposed by defendant to plaintiff's complaint; H. L. Faulkner, Esq., appearing for plaintiff and Henry Roden, appearing for defendant;

argument was heard by the Court and the Court reserved its decision; and now, on this 29th day of August, 1923, the Court having considered the same and being fully advised in the premises:

It is ordered that the defendant's general demurrer to plaintiff's complaint be, and the same hereby is sustained.

Dated this 29th day of August, 1923.

THOS. M. REED,
District Judge.

Copy received 8/29/23.

H. L. FAULKNER,
Plaintiff's Attorney.

Entered Court Journal No. S page 254.

Filed in the District Court, Territory of Alaska, First Division. Aug. 29, 1923. John H. Dunn, Clerk. By ———, Deputy. [43]

In the District Court for the Territory of Alaska
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

Judgment.

Be it remembered that on the 25th day of August, 1923, the demurrer of the above-named defendant

to plaintiff's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action, came on regularly for hearing; that thereafter and on the 29th day of August, 1923, the Court sustained the said demurrer and entered its order accordingly, to which the plaintiff duly excepted; thereupon the plaintiff announces that he will stand upon his complaint and plead no further and moves the Court that judgment be entered herein upon the pleadings to the end that relief may be granted plaintiff by writ of error:

It is therefore ordered and adjudged that plaintiff take nothing by this action, and that the defendant recover its costs and expenses herein.

Done in open court this 29th day of August, 1923.

THOS. M. REED,
District Judge.

Entered Court Journal No. S page 254.

Filed in the District Court, Territory of Alaska, First Division. Aug. 29, 1923. John H. Dunn, Clerk. By _____, Deputy. [44]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

Petition for Leave to Appeal.

To the Honorable Thomas M. Reed, Judge of the District Court, Division Number One, at Juneau, Alaska:

The above-named plaintiff, Paul Lund, conceiving himself aggrieved by the order and judgment made and entered in the above-entitled court and cause on August 29, 1923, whereby it was and is ordered and adjudged as follows, to wit:

First. That defendant's general demurrer to plaintiff's complaint be and the same hereby is sustained.

Second. That plaintiff take nothing by this action and that the defendant recover its costs and expenses herein does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said order and judgment for the reasons set forth in the assignment of errors, and prays that this its petition for the said appeal be allowed and that a transcript of the record proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated at Juneau, Alaska, August 30, 1923.

H. L. FAULKNER,
Attorney for Plaintiff.

Filed in the District Court, Territory of Alaska, First Division. Aug. 30, 1923. John H. Dunn, Clerk. By ———, Deputy. [45]

Order Granting Petition for Appeal.

The foregoing petition for appeal is granted and the claim of appeal therein made is allowed and the cost bond is fixed in the sum of Two Hundred and Fifty (\$250.00) Dollars.

THOS. M. REED,
Judge.

Copy received August 30th, 1923.

HENRY RODEN,
Attorney for Defendant.

Entered Court Journal No. S, page 256.

Filed in the District Court, Territory of Alaska,
First Division. Aug. 30, 1923. John H. Dunn,
Clerk. By ———, Deputy. [46]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

Assignments of Error.

Paul Lund, plaintiff in the above-entitled cause assigns the following error made by the Trial Court in the rendition and entry of the judgment herein and the order sustaining the demurrer of defendant

to plaintiff's complaint upon which the said plaintiff and appellant will reply in the United States Circuit Court of Appeals for the Ninth Circuit for a reversal of the said judgment and said order sustaining the demurrer, as follows, to wit:

I.

The Court erred in making its Order sustaining the demurrer to plaintiff's complaint, which said order (omitting title) is in words and figures as follows:

"This cause came on regularly to be heard on the 26th day of August, 1923, upon the general demurrer interposed by defendant to plaintiff's complaint; H. L. Faulkner, Esq., appearing for plaintiff and Henry Roden appearing for defendant; argument was heard by the Court and the Court reserved its decision; and now, on this 29th day of August 1923, the Court having considered the same and being fully advised in the premises:

"It is ordered that the defendant's general demurrer to plaintiff's complaint be and the same hereby is sustained.

"Dated this 29th day of August 1923.

"(Signed) THOS. M. REED,
"District Judge."

II.

The Court erred in making and entering herein its judgment, which said judgment (omitting title) is in words and figures as follows: [47]

"Be it remembered that on the 25th day of August, 1923, the demurrer of the above-named defendant to plaintiff's complaint on the ground that said complaint does not state facts sufficient to consti-

tute a cause of action, came on regularly for hearing; that thereafter and on the 29th day of August, 1923 the Court sustained the said demurrer and entered its order accordingly, to which the plaintiff duly excepted; thereupon the plaintiff announces that he will stand upon his complaint and plead no further and moves the Court that judgment be entered herein upon the pleadings to the end that relief may be granted plaintiff by writ of error.

“It is therefore ordered and adjudged that plaintiff take nothing by this action, and that the defendant recover its costs and expenses herein.

“Done in open court this 29th day of August, 1923.

“THOS. M. REED,

“District Judge.”

WHEREFORE the plaintiff prays that on account of the errors hereinbefore mentioned and others manifest of record herein, the order allowing the demurrer, and the judgment of the District Court of the District of Alaska, Division No. 1, in this cause be reversed, and the cause remanded, with instructions to enter judgment and decree in favor of the plaintiff herein.

H. L. FAULKNER,

Attorney for Plaintiff.

Copy received August 30, 1923.

HENRY RODEN,

Attorney for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Aug. 30, 1923. John H. Dunn, Clerk. [48]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

Bond On Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Paul Lund, plaintiff-appellant herein, and Allen Shattuck and W. W. Casey as sureties, all residents of the Territory of Alaska, Division No. One, are held and firmly bound unto the above-named Town of Petersburg defendant-appellee, in the sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to the said defendant-appellee, for the payment of which sum well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, successors of assigns, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 30th day of August, in the year of our Lord one thousand nine hundred and twenty-three.

Whereas the above-named, Paul Lund, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Judgment and Decree rendered in the above-entitled

suit by the District Court for the District of Alaska, Division No. One;

NOW THEREFORE, the condition of this obligation is such that if the above-named Paul Lund shall prosecute his said appeal to effect and answer all damages and costs, if he fails to make said appeal good, then this obligation shall be void; otherwise the same shall be in full force and effect.

PAUL LUND,

By H. L. Faulkner,

His Attorney, Principal.

ALLEN SHATTUCK,

Surety.

W. W. CASEY,

Surety. [49]

United States of America,
Territory of Alaska,—ss.

I, Allen Shattuck, whose name is subscribed to the within bond as surety thereon, being first duly sworn, depose and say that I am a resident of the Territory of Alaska, and not an attorney at law nor counsellor, clerk of any court, nor other officer of any court, and that I am worth the sum of Two Hundred and Fifty (\$250.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

ALLEN SHATTUCK.

SUBSCRIBED and SWORN to before me this 30th day of August, 1923.

[Seal]

J. H. HART,

Notary Public for Alaska.

My commission expires Nov. 13, 1926.

United States of America,
Territory of Alaska,—ss.

I, W. W. Casey, whose name is subscribed to the within bond as surety thereon, being first duly sworn, depose and say that I am a resident of the Territory of Alaska and not an attorney at law, nor counsellor, clerk of any court nor any other officer of any court, and that I am worth the sum of Two Hundred and Fifty (\$250.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

W. W. CASEY.

SUBSCRIBED and SWORN to before me this
30th day of August, 1923.

[Seal]

J. H. HART,

Notary Public for Alaska.

My commission expires 11/13/26.

Approved this 30th day of August, 1923.

THOS. M. REED,

Judge.

Filed in the District Court, Territory of Alaska,
First Division. Aug. 30, 1923. John H. Dunn,
Clerk. [50]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

Citation on Appeal.

United States of America,—ss.

To the Town of Petersburg, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, Cal., within thirty days from and after this date, pursuant to an appeal filed in the Clerk's Office of the District Court for the District of Alaska, Division Number One, at Juneau in the above-entitled cause, wherein Paul Lund, the appellant herein, was plaintiff, and the Town of Petersburg, appellee herein, was the defendant; to show cause, if any there be why the judgment and decree entered in said cause of Paul Lund, plaintiff, vs. The Town of Petersburg, defendant, and referred to in the petition for an appeal filed in said cause, which said appeal was by order of the Court allowed, as prayed for, should not be corrected and speedy justice done to the parties in that behalf.

WITNESS The Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 30th day of August, in the year of our Lord one thousand nine hundred and twenty-three.

THOS. M. REED,
Judge of the District Court, District of Alaska,
Division Number One.

Attest: [Seal]

JOHN H. DUNN,
Clerk.

Service admitted August 30th, 1923.

HENRY RODEN,
Attorney for Defendant-Appellee. [51]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

Praeipce for Transcript of Record.

To the Clerk of the District Court, District of Alaska, Division Number One:

You will please prepare a transcript of the record in the above-entitled cause and transmit the same to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, to be used in the appeal herein, said transcript to include the following:

Complaint.

Demurrer.

Memorandum decision.

Order sustaining demurrer.

Judgment.

Petition for appeal and order allowing same.

Assignments of error.

Bond on appeal.

Citation.

This praecipe.

All of which are to be prepared with a view to transmitting the same to the United States Circuit Court of Appeals for the Ninth Circuit in connection with the appeal herein within the time limited by the rules of that court, and when so prepared, you will kindly transmit this record to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

H. L. FAULKNER,

Attorney for Plaintiff.

Copy received August 30th, 1923.

HENRY RODEN,

Attorney for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Aug. 30, 1923. John H. Dunn, Clerk. By ———, Deputy. [52]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

United States of America,
District of Alaska,
Division Number One,—ss.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division Number One, hereby certify that the foregoing and hereto attached 52 pages of typewritten matter, numbered from 1 to 52, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record as per the praecipe of appellant, on file herein and made a part hereof, in the cause wherein Paul Lund, is appellant, and the Town of Petersburg, Alaska, a Municipal Corporation, is appellee, No. 2322-A, as the same appears of record and on file in my office; and that said record is by virtue of a petition for appeal and citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office and that the cost of preparation, examination, and certificate, amounting to Twenty-four and 90/100 (\$24.90) has been paid to me by counsel for appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and the Seal of the above-entitled Court, this 31st day of August, A. D. 1923.

[Seal]

JOHN H. DUNN,
Clerk.

[Endorsed]: No. 4094. United States Circuit Court of Appeals for the Ninth Circuit. Paul Lund, Appellant, vs. Town of Petersburg, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division Number One.

Filed September 7, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

